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May 8, 2013

Hand Delivered
Hon. J Mac Davis
Waukesha County Circuit Court
515 W Moreland Blvd
Waukesha, WI 53188-2411

Re: *Reddelien Road Neighborhood Association, et al. v. DNR,* Waukesha County Circuit Court Case No. 10CV5341 (administratively consolidated with *NLMD, et al. v. DNR,* Waukesha Court Case No. 12CV1751)

Dear Judge Davis,

We are at this time filing the Petitioners' Merits Reply Brief in the above entitled cases. Please also find two sets of the enclosed Reply Brief for each of the above entitled cases so that one set can be placed in the file jacket of each case.

Respectfully,

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Local Counsel

cc: Diane Milligan, Esq. (by Email & Overnight Mail)
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Donald P. Gallo, Esq. (by Email)

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

Reddelien Road Neighborhood Association, Inc. ("RRNA"), et al,

Petitioners,

vs. Case No. 10-CV-5341

The Department of Natural Resources ("DNR"),

Respondent.

North Lake Management District ("NLMD"), et al.

Petitioners,

vs. Case No. 12-CV-1751

The Department of Natural Resources ("DNR"),

Respondent.

PETITIONERS' REPLY BRIEF

Submitted May 8, 2013.

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INTRODUCTION

The DNR has chosen to deal with many of the Petitioners' arguments in their Brief-in-Chief by ignoring or mischaracterizing them. The DNR devotes all of one page to Michael Cain's White Paper[1] concerning the findings required under NR 103, dismissing it as a "guidance document" that Petitioners have taken out of context. The DNR does not even attempt to address the many points made by Mr. Cain in his White Paper, or the Petitioners' numerous points concerning how the DNR failed to follow the prerequisites set forth by Mr. Cain (who was a highly regarded DNR lawyer at the time he drafted the White Paper) for undertaking and documenting an NR 103.08(4)(a) analysis.

The DNR further ignores testimony from its own experts regarding NR 103, desperately and belatedly looking for a missing NR 103 determination in a number of documents that have little or nothing to do with NR 103. It points to one document (Exhibit 214, discussed *infra*) as containing the equivalent of an NR 103 analysis. However, as will be seen, Exhibit 214 in fact does not contain the required analysis and findings, and in fact significantly undercuts most of DNR's other arguments concerning NR 103.

In terms of Chapter 30 and its application to DNR's Manual Code Approval, the DNR ignores stipulations that it has made regarding navigability and the location of the proposed access road. The DNR also ignores inconvenient and unrefuted evidence concerning the lakebed of North Lake. The DNR even goes so far as to make legal arguments that ignore or disregard the clear holding of the

[1] Cain's White Paper is now at Http://dnr.wi.gov/topic/Wetlands/documents/TemplateEnvPlanNR103.pdf.

Wisconsin Supreme Court in *State v. Trudeau,* 139 Wis. 2d 91, 408 N.W.2d 337 (1987). When it isn't mischaracterizing or ignoring the Petitioners' arguments, the DNR continues to resist the fact that these consolidated proceedings arise out of the same project and that the permits are intertwined,[2] or is busy attacking the qualifications of one of the Petitioners' experts.[3] The DNR also argues that the Petitioners' contentions regarding the one-sidedness of the Manual Code procedures have been waived.[4]

The DNR does not address, let alone answer, many of the Petitioners' arguments. In its Response Briefs the DNR makes arguments it has undoubtedly made often over the years, as if ignoring the points made by the Petitioners will make them go away. At times, it is almost as if the DNR and the Petitioners are talking about entirely different cases in their briefs. In this Reply Brief, the Petitioners will set the record straight.

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[2] The DNR continues to argue that Case 1751 and 5341 should be compartmentalized. The Petitioners are not sure what the DNR hopes to accomplish, but the same Judge is going to judge arguments in both cases and there is nothing in Chapter 227 which prevents that Judge from referencing what he has read in Case 1751 when considering and ruling on Case 5341, and visa-a-versa. In addition, both cases are now pending before this Court for a decision on the merits and there is no reason why this Court cannot take judicial notice of the facts of one case when considering the facts of the other case, and vice versa. *Cf.* Wis. Stat. §889.07 (Court records and copies): "[T]he original records… in any action or proceeding of any nature or description in any court of the state, being produced by the legal custodian thereof, shall be receivable in evidence whenever relevant. …" See also §889.15 (Proceedings of other courts as evidence): "The records and judicial proceedings of any court of the United States, or of any state or territory or district thereof and of any foreign country, and copies thereof, shall be admissible in evidence in all cases in this state when authenticated …."

[3] DNR refers to Professor O'Reilly as giving "lay opinions" and claims that he does not have storm water expertise or knowledge of NR 151. The Petitioners are reattaching to this Reply Brief a copy of Professor O'Reilly's 15-page CV as Supplemental Appendix A. He has a PhD in environmental engineering and environmental law and currently serves as a Professor at the Marquette University School of Engineering where he teaches hydrology and water law, among other subjects. As the Court can see, he has done storm water-related work for dozens of municipalities and has written extensively on the subject. When combined with his 16 years at the DNR, his knowledge of hydrology and water related issues far exceeds that of Mr. Hudek, who only recently graduated from college and had only worked for the DNR for four years before issuing the Manual Code Approval. *See* his testimony at TR1, p. 156.

[4] For example, the DNR claims that the Petitioners have waived their right to challenge the DNR's Manual Code Procedure because they did not raise that issue before the ALJ. The RRNA Petitioners have recently addressed this argument in a separate brief filed by them in support of a Motion they have filed with this Court to have the Manual Code Procedure declared unconstitutional.

ARGUMENT

I. MICHAEL CAIN'S WHITE PAPER SETS FORTH THE PROPER NR 103 PRACTICE AND PROCEDURE.

The DNR contends that this Court cannot take judicial notice of Mr. Cain's White Paper. *See* DNR April 13, 2013 Case 5341 Brief (hereafter, "DNR 5341 Brief"), p. 26. It is obvious why the DNR would like to disassociate itself from the Cain directive because the DNR didn't follow it here. But there is no reason that it is not appropriate for judicial notice, and in any event the White Paper by Mr. Cain (who was a full time and highly respected lawyer for the DNR when he authored the Paper) comes within the ambit of §908.01(4)(b) generally. Professor Blinka notes in 7 Wisconsin Practice Series §801.5 (Thomson Reuters 2012) that under §908.01(4)(b) "any statement attributed to one's party opponent may be offered… *against* that party [Emphasis in original]." *Id.* at p. 690.

The DNR dismisses Cain's White Paper as a mere "guidance" document by a former DNR attorney. DNR 5341 Brief, p. 26. First of all, Mr. Cain was not a former DNR attorney when he wrote the White Paper; he was a DNR lawyer providing professional advice to DNR staff regarding the requirements for a proper NR 103 determination. *See* DNR Retirement Resolution for Michael Cain,[5] attached to this Brief as Supplemental Appendix (hereafter, "Supp. App.") B, which establishes that he retired on January 25, 2008. As is clear from his expertise outlined in that resolution, Mr. Cain was eminently qualified to offer an interpretation of NR 103. According to DNR Attorney Michael Cain's very impressive Retirement Resolution:

[5] Located on the DNR Site at http://dnr.wi.gov/about/nrb/2008/January/01-08-7A2.pdf.

> Michael [Cain] has represented the Department in many issues which have proceeded to review by the Wisconsin Court of Appeals and the Wisconsin Supreme Court and which have been critical in the continued evolution of Wisconsin's water law. These cases have dealt with issues such as dockominiums, limitations on oversize piers and the public's rights to use navigable waters. He is recognized as an expert in Wisconsin water law, The Wisconsin Public Trust Doctrine and Wisconsin's wetland laws and has represented the State of Wisconsin in training programs for attorneys, law students, water resource management students, consultants, and the public relating to these areas. He was involved in the development of statutes, rules and policies for the State of Wisconsin throughout his career.

We respectfully urge the Court to read the highlighted portions of Mr. Cain's 21-page White Paper which we have attached to this Reply Brief as Appendix C. *See* Petitioners' attached Supp. App., pp. 332-352. Without citing any authority, the DNR addresses Mr. Cain's Paper on one page of its 5341 Brief (at p. 26) and then dismisses it as having been taken out of context. The DNR further argues that storm water engineer Hartsook did not have any duty to conduct an NR 103 analysis. True or not, at the very least he had a duty under the General Permit to *review* it. He acknowledged that he had this duty in his testimony and even went so far as to admit that without an NR 103 determination he should not have issued a storm water permit on November 4, 2010.

> Q Can we agree -- looking at Page 4 again, and I just want to get you on the record on this, can we agree that if the DNR had **not**[6] done a water quality determination under [General Permit Section] 1.2.2, you would not have been authorized to use this general permit to issue [the November 4, 2010] permit. Would that be a correct statement?
> A [HARTSOOK] Yes, sir.

TRA, p. 29; App., p. 210.

[6] Counsel for the RRNA and the DNR have agreed that although the word "not" is missing from the paper transcript it is in fact audible on the tape recording of that transcript. *See* Agreement, Petitioners' Main Appendix filed March 22, 2013 (hereafter, "Main App."), pp. 210A-210D.

At page 20 of the DNR's 5341 Brief, the DNR has decided to create testimony out of whole cloth by stating that "it would never ask a developer to fill wetland to provide additional treatment." At page 25 of its 5341 Brief, the DNR makes reference to "narrative storm water limitations," without providing authority for its right to do so. Its citation to the Clean Water Act on page 25 of its 5341 Brief is a meaningless reference and provides no support for this approach. Citing 33 USC §1251, et seq. (a statute consisting of hundreds of pages interpreted by thousands of cases) is tantamount to citing the phone book. It does absolutely nothing to explain what the DNR means when it claims it only has to provide a "narrative" explanation of compliance with the provisions of NR 103.

Mr. Hartsook testified that he relied on his friend Andrew Hudek to do the necessary NR 103, but Mr. Hartsook conceded that he never reviewed the supposed NR 103 determination of Mr. Hudek; instead, he had "discussions" with Mr. Hudek. DNR 5341 Brief, p. 26. What we learned during the 5341 Hearing is that in reality there was no NR 103.08(4)(a) determination done by Mr. Hudek or anyone else at DNR, let alone the detailed work outlined by Mr. Cain. According to Mr. Hartsook's testimony in the *5341 Hearing*:

> Q. And I just want to be clear for the record. You, yourself, did not do an NR 103 determination?
> MR. HARTSOOK: No.
> Q. And you, yourself, did not see a physical copy, as in paper copy, of an NR 103 determination?
> MR. HARTSOOK: No, and I don't need to.

TRB, pp. 105-106; App., pp. 235-236. Mr. Hartsook's assertion that he didn't need to see a NR 103 determination can in fact be read as a tacit admission by Mr.

Hartsook of one of two facts; either there was no NR 103 determination for Mr. Hartsook to see; or he did not care what the NR 103 determination would show because he had made up his mind to give the DNR the permit regardless.

Besides complaining that Mr. Cain's Paper was taken out of context, the DNR does not quarrel with the methodology or burdens reviewed in detail by Mr. Cain in his White Paper; nor does the DNR rebut in anyway the outline derived from Mr. Cain's Paper at pp. 40 to 44 of the Petitioners' Brief-in-Chief.

Without repeating everything that was set forth in the Petitioners' Brief-in-Chief, it is important to restate some of what Mr. Cain said about a NR 103 determination. According to Mr. Cain' White Paper: "The project proponent [here, the DNR] has the **burden of proof** to show that they have complied with [NR 103].... **[W]e have stressed this in our training to assure that the program staff [e.g., Mr. Hartsook] require the applicant to submit all information necessary** to allow us to assess whether they have met [the NR 103] standards [Emphasis supplied]." *See* attached Supp. App., p. 336. According to Cain, whenever a project will impact wetlands it is the project applicant's burden to provide all needed information **and the applicant must prove that the requirements of NR 103 have been met**. *Id*., p. 337. Upon receiving the permit application, NR §103.08 requires the DNR, in its role as reviewer of the application (to itself), to consider, among other things, "impacts which may result from the activity" on the standards enunciated under NR §103.03. According to Mr. Cain, "if a project passes the 'initial screening' ... then all the factors in NR §103.08(3)(b)-(f) **must be analyzed** [Emphasis supplied]." *Id*., p. 346. Further, Mr. Cain states, "This step of the process

allows us to assess all steps to 'avoid and minimize' impacts [to wetlands] and to consider **'<u>other adverse environmental consequences</u>,'** such as impacts to critical upland resources, in our review of the project [Emphasis supplied]." *Id*.

Twice, the DNR argues that the Petitioners failed to carry their burden of proof concerning NR 103. This breathtaking assertion completely flip flops who has the burden of proof under NR 103; according to DNR's Michael Cain the burden is (logically) upon the applicant. Here, that is the DNR.

II. THE DNR'S EFFORTS TO IDENTIFY A SUBSTITUTE FOR NR 103 ARE WITHOUT MERIT.

DNR's counsel gamely tries to identify items in the record that "might be" a NR 103 determination. DNR April 19, 2013 1751 Brief [hereafter, "DNR 1751 Brief"], pp. 23 to 25. First, with regard to each of the items referenced in the DNR's brief, at no time did Mr. Hartsook refer to these items as the NR 103 determination during his testimony at the hearing in April of 2012. Second, it is clear from their face that each of the items are not a NR 103.08(4)(a) determination.

The DNR claims that the NR 103 analysis is contained in materials located at R. 811-27, 23-45. DNR Case 1751 Brief, p. 23. In fact, the record reference is to a copy of Petitioners' Exhibit 25 (contained in attached Appendix D) which was produced in response to the Petitioners' third open record request. Dr. O'Reilly testified that Exhibit 25 was not a NR 103 determination. TR A, p. 124. Professor O'Reilly testified as follows regarding Exhibit 25:

> Q. In response to your three [open record] letters … have you ever seen an NR 103 determination for the site?
> PROFESSOR O'REILLY: All I have seen is the document [Exhibit 25] that was handed to me yesterday…

> Q. It's not an NR 103 determination?
> PROFESSOR O'REILLY: It's not a determination…

TRA, pp. 120-121; Main App., pp. 231A-231B.

And from even a cursory review of Exhibit 25, it is clear that it contains none of the required findings pertaining to the stormwater impacts to the functional wetland values set forth in NR §103.03 and NR §103.08**.** At best, it only pertains to one component of the required analysis, relating to practicable alternatives which is contained in NR §103.08(4)(a)1. More specifically, according to Mr. Cain, "if a project passes the 'initial screening' ... then **all the factors in NR §103.08(3)(b)-(f) must be analyzed** [Emphasis supplied]" (*See*, attached Supp. App., p. 346). Here is what NR §103.08(3)(b)-(f) provides:

> (3) To protect all present and prospective future uses of wetlands, the following factors shall be considered by the department in making determinations under this section:
> (a) Wetland dependency of the proposal;
> (b) Practicable alternatives to the proposal which will avoid and minimize adverse impacts to wetlands **and will not result in other significant adverse environmental consequences**;
> **(c) Impacts which may result from the activity on the maintenance, protection, restoration or enhancement of standards under s. NR 103.03**;
> (d) **Cumulative impacts attributable to the proposed activity which may occur, based upon past or reasonably anticipated impacts on wetland functional values of similar activities in the affected area**;
> (e) **Potential secondary impacts on wetland functional values from the proposed activity**; and
> (f) Any potential adverse impacts to wetlands in areas of special natural resource interest as listed in s. NR 103.04 [Emphasis supplied].

Exhibit 25 does not contain any indication that the bolded portions of Wis. Admin. Code §103.08(3)(b)-(f) have been addressed in that exhibit. As one can

further see from the foregoing, NR §103.08(3)(c) additionally cross-references to and requires compliance with NR §103.03. With regard to NR §103.03, there is likewise no indication on the face of Exhibit 25 that any of the water quality standards set forth in NR §103.03[7] have been addressed.

Interestingly, the DNR next points to DNR Exhibit 214. DNR 1751 Brief, p. 24. Ironically, since the Petitioners anticipated that the DNR would try to argue various alternatives for a NR 103 determination, Exhibit 214 was the exact document the Petitioners had planned to use in this Reply to demonstrate the importance of a thorough NR 103 analysis. Exhibit 214 is attached to this Reply Brief at Supp. App. E. Exhibit 214 is an old record of a visit to the Kraus Site (Exhibit 214 is dated October 2009). It is obviously a form that evaluators are supposed to use in making an initial assessment of a site, and that is undoubtedly why it is styled "Rapid Assessment Methodology for Evaluating Wetland Functional Values."

This exhibit was first referenced in testimony given by Mr. Hudek on October 31, 2011 (TR4, p. 166). At no time during his testimony on that date or any other date did Mr. Hudek identify Exhibit 214 as the NR 103.08(4)(a) determination. Nor did Mr. Hartsook at the evidentiary hearing on the stormwater permit. Further, as is evident on its face, this form does not contain any of the specificity, finding of facts, or conclusions referenced by Mr. Cain concerning a NR 103.08(4)(a) determination. *See* Cain Paper, Supp. App., p. 348. In effect, Exhibit 214 is a description of the wetlands and all of its positive environmental aspects, not

[7] See NR 103.03 set forth *infra* in footnote 10, *infra*.

an analysis of how stormwater discharges will impact the wetlands. What is particularly interesting about Exhibit 214 is just what Mr. Hudek and the evaluators found during this initial visit to the Kraus Site, and this begs the question: "Didn't Exhibit 214 place the DNR on notice that they needed to perform a full NR 103 analysis and determination as outlined by Mr. Cain in his White Paper?" This is because we learn the following from the face of Exhibit 214:

1. According to the summary table on page 1 of Exhibit 214, Wildlife, fishery and aesthetics rank high in importance at the Kraus Site and the value of the Kraus Site wetland for water quality protection is exceptional. *See* attached Supp. App., p. 365.

2. At 1 C and E on page 2 of Exhibit 214, it is reported that the Kraus wetland has an inlet and an outlet. We also learn that there is standing water on the site ranging in depth from 6 to 24 inches and that the site is 70% inundated. *See* attached Supp. App., p. 366.

3. In view of the statement by the DNR at p. 14 of its 1751 Brief that the Petitioners "never established that the wetland was connected to North Lake," the handwritten note at the bottom of page 2 of Exhibit 214 (at attached Supp. App., p. 366) is telling. That note reads: **"A surface water connection to North Lake is present, however, frequency and duration are unknown."** *Id.*

4. On page 5 of Exhibit 214, we learn that there are rare, endangered or threatened species in the wetland. *See* attached Supp. App., p. 369.

5. On page 6 of Exhibit 214, we learn that the wetland is part of a wildlife corridor or designated environmental corridor and that there are other wetlands near the Kraus wetland that are important to wildlife. We learn that the Kraus wetland is a source of food for fish and wildlife. Most significantly, we learn from page six of Exhibit 214 that **"the wetland is contiguous with a permanent waterbody and periodically inundated for sufficient periods of time to provide spawning/nursery habitat for fish**." *See* attached Supp. App., p. 370.

6. At the bottom of page 6 of Exhibit 214, we learn that the wetland significantly reduces run-off velocity due to its size, configuration, braided flow or vegetation type. **(This also begs the question, "why didn't the DNR do a flood flow analysis pursuant to Wis. Stat. §30.12"**?) *See* attached Supp. App., p. 370.

7. On page 7 of Exhibit 214, we learn that the wetlands in question are spectacular in terms of the protection they afford water quality. Referring to just a few items on page 7 of Exhibit 214: 3) the wetlands provide significant flood stormwater attenuation (i.e., protection); 4) the wetlands have significant vegetative density to decrease water energy and allow for settling; 5) the wetland holds run-off before allowing it to enter surface water. We also learn from page 7 of Exhibit 214 that significant nutrient and sediment flows come from surrounding lands. *See* attached Supp. App., p. 371.

8. Regarding aesthetics, we learn from page 8 of Exhibit 214 that the wetlands rank as very important because they are visible from roads and houses and are near population centers and the public could have direct access to the wetlands. According to page 8 of Exhibit 214, the wetlands currently are relatively free from human influences. And finally, at no. 11 on page 8 of Exhibit 214, we learn that the wetlands have the potential to be used for educational purposes. *See* attached Supp. App., p. 372.

In short, from Exhibit 214 the DNR knew of a multitude of reasons why the DNR needed to conduct a full NR 103 analysis and determination. The content of Exhibit 214 only strongly reinforces the Petitioners' concerns about devastating the wetlands and the navigable water that exist on the Kraus Site by thoughtless and poorly planned development.

In terms of navigability in the context of Case 1751, the DNR evaluators candidly admit in Exhibit 214 that the site is covered with 6 to 24 inches of standing water and is 70% inundated. *See* attached Supp. App., p. 366. Most importantly, the handwritten note at the bottom of page 2 of Exhibit 214 (at attached Supp. App., p. 366) gives the lie to DNR's argument that the navigable wetlands on the Kraus Site are not connected to North Lake. Directly contrary to DNR's assertion that the "Petitioners did not establish that the wetland was connected to North Lake," (DNR 1751 Brief, p. 14), the DNR evaluators who authored Exhibit 214 had no hesitancy

in concluding that "A surface water connection to North Lake is present, however frequency and duration are unknown." *See* attached Supp. App., p. 366.

In a last ditch effort, the DNR then asserts that the Manual Code Decision itself (also known as the "MC Approval") issued on November 4, 2010 is comparable to a NR 103 Determination. DNR 1751 Brief, p. 24. There are several problems with this argument. Most importantly, like several other documents the DNR is now saying are tantamount to a NR 103.08(4)(a) determination, Mr. Hartsook never testified that the MC Approval was this determination.

In fact, it is just the opposite. Supp. App. G contains pages 26 to 33 from the TRA transcript of the April 18, 2012 storm water hearing before ALJ Boldt. The Petitioners made it abundantly clear throughout the April storm water hearing that they had not seen a NR 103 determination. TRA, pp. 30-32; Supp. App., pp. 388-390. And yet, after asking Mr. Hartsook where we would find a NR 103 determination in the record (TRA, pp. 25; Supp. App., pp. 384), we asked Mr. Hartsook if he might have been relying on the Manual Code as a substitute for the NR 103. Here is our question to Mr. Hartsook along with his answer:

> Q. You were relying on the manual code that was issued here on the same date that your [storm water] application was issued, November 4…
> A. No, I'm not relying on that…

TRA, pp. 26-27; Supp. App., pp. 384B-385.

Despite repeated opportunities, Mr. Hartsook never identified the MC Approval as a NR 103 determination. In fact, he testified that he never saw any NR 103 determination. TRB, pp. 105-106; Main App., pp. 235-236. With so much interest in a NR 103 determination, why didn't Mr. Hartsook point to the

suggestions now being made by the DNR as to where the Court should look to find the equivalent of a NR 103? The answer is that he knew it didn't exist.

There are other reasons why the MC Approval is not the equivalent of a NR 103 determination. The MC Approval merely contains conclusions. Those conclusions do not substitute for the detailed site specific analysis and determination mandated by NR §103.08(4)(a), NR §103.08(3)[8] and NR §103.03[9] that Attorney Michael Cain states are required under NR 103. For example, there is nothing in the MC Approval about cumulative impacts on wetlands [NR §103.08(3)(d)] or secondary impacts [NR §103.08(3)(e)]. There is also nothing in the conclusions about filtration or storage of sediments, nutrients or toxic substances [NR §103.03(1)(c)], or recreational, cultural, educational, scientific and natural scenic beauty values and uses [NR §103.03(1)(g)].

At best, the November 4, 2010 MC Approval simply repeats some of the concerns the DNR would have with regard to any wetland because of its extensive institutional knowledge of NR 103. The language in the MC Approval just

[8] NR 103.08(3) is set forth in full in the text at page 8, *supra.*

[9] NR 103.03 Wetland water quality standards consist of the following.
(1) To protect, preserve, restore and enhance the quality of waters in wetlands and other waters of the state influenced by wetlands, the following water quality related functional values or uses of wetlands, within the range of natural variation of the affected wetland, shall be protected:
(a) Storm and flood water storage and retention and the moderation of water level fluctuation extremes;
(b) Hydrologic functions including the maintenance of dry season stream flow, the discharge of groundwater to a wetland, the recharge of groundwater from a wetland to another area and the flow of groundwater through a wetland;
(c) Filtration or storage of sediments, nutrients or toxic substances that would otherwise adversely impact the quality of other waters of the state;
(d) Shoreline protection against erosion through the dissipation of wave energy and water velocity and anchoring of sediments;
(e) Habitat for aquatic organisms in the food web including, but not limited to fish, crustaceans, mollusks, insects, annelids, planktonic organisms and the plants and animals upon which these aquatic organisms feed and depend upon for their needs in all life stages;
(f) Habitat for resident and transient wildlife species, including mammals, birds, reptiles and amphibians for breeding, resting, nesting, escape cover, travel corridors and food; and
(g) Recreational, cultural, educational, scientific and natural scenic beauty values and uses.

reinforces the fact that the DNR knew or should have known that it had an obligation to complete a NR 103.08(4)(a) determination. Citing to the MC Approval as evidence of a NR 103 analysis is the ultimate in circular reasoning.

Finally, the DNR desperately tries to cure the lack of a proper NR 103 determination by asserting that the NLMD should be barred from making this claim based upon an unpublished January 11, 2012 Court of Appeals Per Curiam decision (Appeal No. 2010AP2623). DNR 1751 Brief, p. 25. First, the RRNA was not a party to that proceeding, and DNR implicitly concedes that the RRNA would not be so barred. Second, that case was not even about NR 103. It was about WEPA which "is procedural in nature and does not control agency decision making." *Id.* at ¶5. The only true dispute at issue in that case was whether the DNR created a reviewable record. *Id.* at ¶¶8-9.

It is true that the decision identifies a number of visits by various members of the DNR to the Kraus and Kuchler sites, mainly to evaluate the NLMD's two site boat launch proposal. *Id.* at ¶14. All this lends further support to the previous points made with regard to Exhibit 214; based upon the many visits by DNR evaluators to the site, the DNR knew or should have known that the character of the Kraus Site necessitated a full NR 103 analysis and determination, which was never done.

At the end of the day, try as DNR's counsel might, they cannot come up with the detailed written determination mandated by NR 103.08(4)(a). Mr. Hartsook did not see a NR 103 determination because it does not exist. But the terms of NR §103.08(4)(a) are very clear: "[T]he department **shall** make a finding [Emphasis supplied]" that NR Chapter 103 has been complied with if:

> 1. No practicable alternative exists which would avoid adverse impacts to wetlands.
> 2. If subd. 1. is met, **all practicable measures to minimize adverse impacts to the functional values of the affected wetlands have been taken**.
> 3. If subds. 1. and 2. are met, **utilizing the factors in sub. (3) (b) to (g)**[10] and considering potential wetland functional values provided by any mitigation project that is part of the subject application, **that the activity will not result in significant adverse impacts to wetland functional values, significant adverse impacts to water quality or other significant adverse environmental consequences** [Emphasis supplied].

In terms of NR §103.08(4)(a)2 and 3, there is nothing in the record that reads remotely like such a determination. Moreover, NR 103.08(4)(a)3 states that an applicant must consider each and every factor delineated in NR § 103.08(3)(b) to (g). Here, there is nothing that comes close to showing compliance with each of these factors. And there is further nothing to show compliance with NR §103.03, as required by NR §103.08(3)(c).

As for the DNR's claim that it did a "narrative" NR 103 analysis, there is simply nothing in NR 103 that allows for "narrative" compliance. According to Mr. Cain, there must be specific findings of fact and conclusions of law based on a site specific analysis that accounts for all of the factors set forth in NR §103.08(4)(a), NR §108.03, and NR §103.03. Such an analysis does not exist.

III. THE DNR IGNORES OR MISCONSTRUES THE PETITIONERS' CHAPTER 30 ARGUMENTS.

The DNR mischaracterizes Petitioners' arguments regarding the applicability of Chapter 30 to its Manual Code Approval by asserting that "petitioners' whole case relies on the faulty assertion that a wetland in the middle of DNR's property is

[10] And NR §103.08(3)(c) cross-references to NR 103.03.

actually part of the lakebed of North Lake." (DNR 1751 Brief, p. 9). But the area where DNR intends to place fill in connection with the construction of its proposed access road does not depend on that area being lakebed in order for Chapter 30 to apply. It only need be "navigable." Here, DNR has stipulated that it is navigable,[11] and thus Chapter 30 applies on its face. In other words, the Petitioners' contention that Chapter 30 also applied because the area where the DNR intends to place fill to construct its access road constitutes "lakebed" was an alternative argument. And, as explained in Section B below, in attacking that argument DNR ignores unrefuted facts, confuses other facts (citing to testimony that pertained to the "Grove of Trees," a completely different area that is not part of Petitioners' lakebed contention), disregards a key ALJ finding, and misconstrues the Wisconsin Supreme Court's decision in *Trudeau* (discussed *infra*) which makes clear that if the area at issue is below the Ordinary High Water Mark ("OHWM") of the lake (not some inland OHWM as DNR contends), it is lakebed subject to Chapter 30.

A. DNR's Stipulation that the Area Where it Intends to Place Fill for the Proposed Access Road is "Navigable" Ends the Inquiry: Chapter 30 Applies.

Whether or not the area adjacent to the existing access road where the DNR intends to place fill is "lakebed" and thus subject to Chapter 30 (see discussion below), lakebed or not, Chapter 30 applies because that area is navigable. *See* Petitioners' Brief-in-Chief, pp. 25-30. Grasping at straws, the DNR now appears to argue that Chapter 30 only applies to lakes and streams that are navigable-in-fact, citing to Wis. Stat. §§30.10(1) and (2). *See* DNR 1751 Brief, p. 21. Mixing apples and oranges, it then says that because this area isn't "lakebed" Chapter 30 doesn't

[11] *See* the stipulation at TR1, pp. 231-232; Main App., p. 176.

apply. *Id*. But Chapter 30 is not limited to only lakes and streams. Chapter 30.12(1)(a) specifically provides that a permit is required for the placement of material upon the bed of "any navigable water." Tellingly, DNR's excuse at the contested case hearing for not subjecting the proposed fill in this area to Chapter 30 was not that Chapter 30 didn't apply because the area wasn't a "lake or stream;" its contention was that because the area was also wetlands, it was enough for it to only apply NR 103. The ALJ bought this argument, finding that the DNR "did not separately evaluate whether the fill to be placed in the navigable wetland … met the standards under Wis. Stat. § 30.12(3m)(c) … nor did it make specific findings in the MC Approval in regard to Wis. Stat. § 30.12(3m)(c) for that fill." *See* 5/4/12 FOF ¶10; Main App., p. 121. This is because DNR's failure to evaluate and apply Chapter 30 was "consistent with its longstanding usual practice" whereby it instead evaluated the fill placement under NR 103. *See id.*, 5/4/12 FOF ¶¶10, 11.

But the fact that DNR evidently has consistently been ignoring Chapter 30's mandate that it applies to "any navigable waters," wetlands or not, does not make it right (If one consistently exceeds the speed limit, does their speeding become legal?). If an area is both "navigable" and "wetlands," then quite simply both Chapter 30 and NR 103 apply. Because the DNR did not evaluate the proposed placement of fill under Chapter 30 or make findings required by Chapter 30, the Manual Code Approval is invalid.

DNR's after-the-fact argument that an NR 103 analysis was sufficient because it supposedly covered the relevant provisions of Chapter 30 (DNR 1751 Brief, pp. 26-28) is a red herring and cannot salvage its concession (and the ALJ's

finding) that in issuing the Manual Code Approval DNR did not evaluate the proposed placement of fill in the navigable waters under Chapter 30. As DNR's 1751 Brief points out, Chapter 30.12(3m)(c) requires the DNR to make three specific findings in order to issue a permit:

1. The structure or deposit will not materially obstruct navigation.

2. The structure or deposit will not be detrimental to the public interest.

3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

Not one of these required findings are contained in the Manual Code Approval. While DNR can now argue all that it wants that it believes that those standards have been met, Chapter 30.12(3m)(c) requires that the DNR make those findings when it issues the permit. Here, it is undisputed that it did not.

B. <u>Chapter 30 Applies Because</u>
<u>The Proposed Access Road Area Also is Lakebed</u>.

In its argument that the area adjacent to the access road is not "lakebed," the DNR ignores key undisputed facts and misconstrues *State v. Trudeau,* 139 Wis. 2d 91 at 103-104, 408 N.W. 2d 337 (1987).

Here are the key facts that the DNR overlooks:

(1) The navigable area along side the existing dirt road that the DNR intends to fill in order to expand that road is below the Ordinary High Water Mark ("OHWM") of North Lake.

(2) That area is connected to North Lake and water flows both into and out of that area from North Lake.

The DNR does not contest Key Fact No. 1 above; instead it argues that "Petitioners' never established an OHWM around the wetland…" *See* DNR 1751 Brief, p 14. The DNR is deliberately turning a blind eye to *Trudeau* because under

that case it is not the OHWM *of the wetlands* that matters to the lakebed analysis; it is the OHWM *of North Lake*.

> The public interest in and title to the navigable waters in this state attaches to more than the open and perpetually navigable waters contained in lakes, rivers and streams. ***It extends to areas covered with aquatic vegetation within the ordinary high water mark of the body of water in question.*** Public ownership of the bed applies whether the water is deep or shallow [Emphasis supplied].

State v. Trudeau, supra, at 103-104. Here, based upon the DNR's own measurements, the OHWM of North is 897.96. *See* TR 1, p 80; Main App. p. 170**.** And the undisputed elevations of the area where DNR plans to expand the east-west access road establish that this area is below North Lake's OHWM. *See* RRNA Brief-in-Chief, pp. 32-33; *see also, e.g.*, Exhibit 129; Main App., 291.

DNR does not contest the accuracy of the elevations but instead it rambles confusingly about the fact that supposedly no one testified about an identifiable bed and bank or OHWM in the portion of the navigable wetlands where it intends to build the access road, and it also asserts that this area was "pretty brushy." *See* DNR 1751 Brief, pp. 11-13. These assertions are non-sequiturs. As discussed above, the DNR has stipulated that the area constitutes navigable waters. *See* TR1, pp. 231-232 Main App., p. 176. So if a bed and bank are required characteristics of navigable waters (as DNR now appears to argue), its stipulation answers that question. Second, contrary to DNR's assertions, Professor O'Reilly did testify that this area had a bed and bank. *See* RRNA Brief-in-Chief, p. 31. What is interesting here is the fact that **DNR's own witness Robert Wakeman agrees with Professor O'Reilly**. Regarding a bed and bank in the area where Paige Hanson paddled her kayak in

Exhibit 17N (the area into which DNR intends to expand the access road), Robert Wakeman provided the following interesting testimony during the hearing on navigability:

> Q. [W]hat I'm trying to get at is where the young girl was paddling and she paddled past the sign, was there or was there not a bed and bank?
> A [WAKEMAN]. There's bed and bank and an ordinary high water mark.
> Q. So that would be navigable water?
> A [WAKEMAN]. Yes.

TR4, p. 125; Main App., p. 200. **DNR conveniently ignores this testimony.**

DNR also relies on an ALJ finding that is completely irrelevant, citing to the ALJ's May 2012 FOF ¶ 14 to support its assertions that there is no evidence of a bed and bank or identifiable OHWM. DNR Case 1751 Brief, p. 13. But this finding does not even pertain to the proposed access road area. As the finding specifically states, it pertains to the area in and around the "Grove of Trees" where the parking lot is to be constructed, an area not covered by the DNR's stipulation on navigability and an area that Petitioners originally contended was navigable; however, the Petitioners have now abandoned that issue for the purpose of this judicial review proceeding.

Finally, the fact that the area may be "brushy" does not mean it is not lakebed. *Trudeau* makes clear that an area need not be navigable and can be highly vegetated and still constitute lakebed.

> **An area need not be navigable to be lakebed.** If the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant . . . . **Lakebed may be heavily vegetated by plants rising far above the water** [Emphasis supplied].

Trudeau 139 Wis. 2d at 103-104.

As to the second key fact under *Trudeau,* as noted above, the evidence was unrefuted, and the ALJ found, that water flows both into and out of North Lake into the wetlands where the access road is to be built. *See* 5/4/12 FOF ¶ 15; Main App., p. 123. To this the DNR only responds with a conclusion, without citation to any part of the Record, that Petitioners "did not establish that the wetland was connected to North Lake." DNR 1751 Brief, p. 14. It evidently has forgotten about the ALJ's finding on this fact, and all of the testimony, including from its own witnesses, that there was a connection between North Lake and the wetlands and that water flowed both ways. RRNA Brief-in-Chief, pp. 20, 34-35.

DNR also apparently has forgotten Mr. Hudek's handwritten note on Exhibit 214 which states: "A surface water connection to North Lake is present, however, frequency and duration are unknown." Exhibit 214 also makes clear (at 1C and E on page 2 of Exhibit 214) that there is standing water on the site ranging in depth from 6 to 24 inches and that the site is 70% inundated. So DNR's assertion that the Petitioners "did not establish that the wetland was connected to North Lake," is completely without merit. Finally, neither the ALJ's findings nor conclusions of law even mention, much less address, the *Trudeau* decision. By ignoring *Trudeau,* the ALJ's decision that the area adjacent to the access road does not constitute lakebed is erroneous as a matter of law, and the Manual Code approval should for that reason alone be set aside under Wis. Stat. §227(5).

C. <u>The DNR has Forgotten about the Position it took in Kelly.</u>

As noted above, the DNR attempts to discount *Trudeau* by arguing that the Petitioners never established the OHWM around the wetlands. Besides its ignoring

that it is the OHWM of the lake that matters under *Trudeau*, the DNR's argument also is directly at odds with its approach when evaluating applications by other citizens. In *State v. Kelley*, 2001 WI 84, 244 Wis. 2d 777, 629 N.W.2d 601, the DNR argued **exactly the opposite** of what it is arguing in the case at bar. In its brief to the Wisconsin Supreme Court in *Kelley* (a relevant excerpt from same is included in attached Sup. App. G), DNR unequivocally asserted an OHWM is irrelevant to any determination of whether water adjacent to a lake is part of the lake or is navigable.

In *Kelley* the DNR argued that "[b]ecause the fill area is navigable-in-fact, **any dispute as to the OHWM is irrelevant** [Emphasis supplied]." *See* DNR Brief filed December 5, 2000 in *State v. Kelley*, Wisconsin Supreme Court Appeal No. 99-1066 [set forth in Supp. App. F and hereafter referred to as the "DNR *Kelley* Brief"], p. 19; *see* attached Supp. App., p. 383. In its *Kelley* Brief, the DNR reviewed the definition of navigable water: "A water body that is navigable-in-fact is one that 'has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets…. The test is not whether the stream is navigable in a normal or natural condition…. [F]or purposes of determining the extent of control of the public trust it is immaterial what the character of the stream of water is. It may be deep or shallow, clear or covered with aquatic vegetation." *See* attached Supp. App., p. 374.

In its *Kelley* Brief, the DNR then embarked on an argument that is completely contrary to what it is now contending. According to the DNR in its *Kelley* Brief:

> **The defendants [Kelleys] argue that a finding of navigability-in-fact does not alone trigger state regulation, but that navigable water must also be found to be located below the ordinary high water mark (OHWM).** … Even if the defendants' contention that the OHWM is disputed is correct, the court of appeals properly held that such a dispute is irrelevant. **Water that is navigable-in-fact is, as a matter of law, subject to state regulation under Wis. Stats. § 30.12… The precise identification of the OHWM is needed only where an activity straddles the bed and upland of a water body, or where there is a question of ownership…** [Emphasis supplied].

DNR *Kelley* Brief, p. 11; Supp. App., p. 375.

The DNR continued by asserting the following important point in its *Kelley* Brief: "[E]ven if 'the body of water found to be navigable … is small, … if it is navigable in fact and constitutes a public highway **the rights of the public therein are… sacred**… [Emphasis supplied].'" *See* attached Supp. App., p. 379. The DNR emphatically made the following crucial point in its *Kelley* Brief:

> **[W]here an area is navigable-in-fact, determining the ordinary high water mark is not necessary to authorize state regulation of activity in that area in order to protect public rights**…. **Because the fill area is navigable-in-fact, any dispute as to the OHWM is irrelevant** …. [Emphasis supplied].

Id. at p. 16, 19; Supp. App., pp. 380, 383.

Based on the arguments in *Kelley,* the area where the east west access road traverses the Hanson property is not just navigable because it might be a stream or a marsh outlet; it is navigable as DNR has so stipulated and because it partakes in the navigable waters of North Lake, regardless of any OHWM. Therefore, that navigable area which DNR intends to fill requires a permit under Wis. Stat. §30.12.

IV. THE DNR'S STORMWATER PLAN DOES NOT COMPLY WITH NR 151.

The DNR asserts that if the stormwater plan cannot achieve the 80% and 40% TSS removal standards prescribed under NR 151.12(5)1 and 2, it is nonetheless permitted to make a determination that it has satisfied those requirements "to the maximum extent practicable" (MEB). DNR 5341 Brief, p. 12-13. It then argues that its "determination that the stormwater plan … satisfied TSS removal standards to the maximum extent practicable" was reasonable and therefore should be affirmed. DNR 5341 Brief, p. 14.

This argument is fatally flawed for the following reasons. As DNR's 5341 Brief recites (p. 13), NR 151.12(5)5 specifically requires that "if the design cannot achieve the applicable total suspended solids reduction specified, **the storm water management plan shall include a written and site-specific explanation why that level of reduction is not attained** and the total suspended solids load shall be reduced to the maximum extent practicable." Here, the stormwater plan contains no "written and site-specific explanation why" the TSS removal standards (the 80% and 40%) are not attained and that instead the TSS load is being reduced "to the maximum extent practicable." That is because the 2009 stormwater plan calculated that the TSS that would be removed by the plan "exceeds the . . .TSS removal required by NR 151." Kapur 9/22/09 Report, p. 5 contained in DNR App. 14. *See also* calculations at DNR 5341 Brief, p. 15.

But the stormwater plan's determination that the TSS removal rates "exceeded" NR 151's requirements hinged upon the entire proposed access road

being classified as "redevelopment," including the 150 foot stretch that will be built completely in the wetlands. As pointed out in the RRNA's Brief-in-Chief, that classification is illogical, contrary to DNR's own guidance, and not supportable. RRNA Brief-in-Chief, p. 24.

DNR's after-the-fact attempt to now say that none of this matters because the stormwater plan met the "MEP" standard fails because its own stormwater plan does not include what is specifically required by NR 151.12(5)5, namely: the code-required written site-specific explanation. DNR's reliance on what several of its witnesses said about compliance with MEP at the April 2012 hearing cannot save the day. NR 151.12(5)5 requires the stormwater plan itself to include a "written" explanation. In this case, it doesn't.

For much of the DNR's 5341 Brief, it belittles the experience and knowledge of the Petitioners' experts. Professor O'Reilly's credentials are manifest (*see* attached Supp. App. A). However, what is truly disturbing is the fact that DNR completely ignores the stipulation entered into at the 5341 Hearing that at least 150 feet of the proposed east-west road will be built completely in the navigable wetlands.[12] Clearly, at least for 150 feet we are not talking about "redevelopment." Just as clearly, the DNR has failed to discuss, let alone explain, the significance of that stipulation in its 5341 Brief.

The DNR is strangely quiet about the argument Petitioners' argument at pp. 46-47 of their Brief-in-Chief that the 12-foot widening of the proposed east west access road will be built where no path, driveway or lane has been built in the past

[12] The DNR has specifically stipulated as follows: "[A]t least 150 of the proposed access road … is completely off the existing footprint of the current path…" TRA, p. 80; Main App., p. 231.

and, as a consequence, the 12 feet of additional road width that the DNR intends to build would be "new development." *See* Ex. 29, App., p. 302; TRA pp. 199-200. App., pp. 303-314. The DNR is equally silent about the Petitioners' argument at p. 47 of their Brief-in-Chief that Exhibit 35 makes clear that "wooded areas and other natural areas are not considered development" and thus the part of the access road that must be built where large trees now exist cannot be by definition **re**development. Petitioners' Brief-in-Chief, pp. 47-49.

The Petitioners do not waive any of their other arguments in their Brief-in-Chief concerning development vs. redevelopment because they are not repeated in this Reply Brief.

V. THE DNR IS CONFUSED AS TO THE FACTS OF THIS CASE.

Throughout its 1751 Brief, the DNR appears to forget that in terms of navigability, the Petitioners have abandoned issues relating to the Grove of Trees area where the DNR intends to put the parking lot. Unfortunately, many of the points that DNR struggles to make relate to this abandoned issue and have nothing to do with the Petitioners' arguments regarding the proposed access road.

For example, the reference to Professor O'Reilly's determination of a OHWM (DNR 1751 Brief, p. 12) is one such mistaken reference, as is the assertion concerning a channel and bank at the end of that page. On page 13 of the DNR's 1751 Brief it once again references an ALJ Finding that pertains to the lack of a bed and bank or OHWM in the Grove of Trees area. At page 21 of its DNR's 1751 Brief it again is confused. It appears to assume that the Petitioners have abandoned an argument that a portion of the area where the proposed east west road traverses the

Hanson property is a stream and are now arguing it is part of the lakebed of North Lake. This is a "straw man" argument. First, as noted *supra,* Wis. Stat. §30.10(2) does not apply just to lakes and streams; it additionally applies to *any* body of water that is "navigable." In addition, that area also is a marsh outlet (see discussion at page 31 of Petitioners' Brief-in-Chief), and for that one additional reason would be subject to Wis. Stat. §30.12.

CONCLUSION

The DNR may not care for what Attorney Michael Cain had to say in 2007, but his expertise and his carefully researched and reasoned White Paper makes it clear what the DNR ought to have done pursuant to NR 103. And the DNR's own Exhibit 214 underscores why it was essential for them to have done as Mr. Cain recommended. The DNR also cannot explain away its failure to apply Chapter 30 to what it concedes is navigable waters. Frankly, the DNR does not much care for case law or experiences that don't agree with its present mind set and its goals. Its briefs ignore certain key facts, and distort Wisconsin Supreme Court precedent that is directly on point.

And the DNR doesn't even mention the *Froebel* decision in its 1751 and 5341 Briefs in the cases at bar; no doubt it cannot explain away the environmental harm it did when it improperly took down Funks Dam over the objections of its own experts. Apparently, the DNR just wants everyone to "get over it" and move on to other issues. But the *Froebel* case is very important. As *Froebel* teaches, if the DNR is wrong again, there is no remedy for the citizens of North Lake; the DNR will simply claim Sovereign Immunity and move onto its next adventure.

This case is not about stopping the DNR from achieving public access to North Lake. It is not even about stopping the DNR from achieving public access through and by the Kraus Site, if absolutely necessary. This case is about insuring that the DNR fairly and transparently applies the same rules and law to itself, **when it seeks a permit from itself** that it applies to everyone else. This case is about avoiding another, and potentially more damaging, *Froebel* disaster. And that is why the Petitioners ask that the DNR reverse the Manual Code Approval and storm water permit and remand same with instructions that DNR properly complete all required tests under NR 103 and Wis. Stat. Chapter 30.

Respectfully submitted this 8th day of May, 2013.

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SUPPLEMENTAL APPENDIX

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